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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 13

WILLIAM L. MAXWELL, *Petitioner,*

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The American Psychiatric Association is a nonprofit organization incorporated in the District of Columbia with a present membership of over 17,000 psychiatrists located throughout the United States. Founded in

Philadelphia in 1844 as the Association of Medical Superintendents of American Institutions for the Insane, the Association is the oldest continuing national medical society in the United States. In 1921 the present name of the organization was adopted, and in 1927 the Association was incorporated in the District of Columbia.

The American Psychiatric Association is a society of medical specialists brought together by a common interest in the continuing study of psychiatry, in working together for more effective application of psychiatric knowledge to combat the metal illnesses, and in promoting mental health of all citizens. Among the Association's earliest accomplishments was its participation in the transfer of the mentally ill from jails and almshouses to medical institutions, and in the inauguration of a program of moral treatment that embodied the rudiments of modern community psychiatry. In the Association's constitution its objectives are stated as follows:

> To further the study of the nature, treatment, and prevention of mental disorders and to promote mental health.
>
> To promote the care of the mentally ill.
>
> To further the interests, the maintenance, and the advancement of standards of all hospitals for mental disorders, of out-patient services, and of all other agencies concerned with the medical, social, and legal aspects of these disorders.
>
> To make available psychiatric knowledge to other branches of medicine, to other sciences, and to the public.

In furtherance of the purposes of the Association, its governing Board of Trustees adopted a resolution

at its December 12, 1969, meeting condemning capital punishment and authorizing the filing of this brief amicus curiae. The resolution of the Board of Trustees is set out below:

RESOLUTION

> Resolved, that the American Psychiatric Association, through its Board of Trustees, opposes the death penalty and calls for its abolition. The best available scientific and expert opinion holds it to be anachronistic, brutalizing, ineffective and contrary to progress in penology and forensic psychiatry.

This brief is filed amicus curiae for the Association in order to bring before this Court some psychiatric views of capital punishment which have not heretofore been stressed in this case. Consent of the parties for the filing of the amicus curiae brief has been sought and obtained. Copies of the parties' letters will be submitted to the Clerk with this brief.

ARGUMENT

This brief amicus is prompted by the submission of respondent herein:

> "1. What the case really involves is whether the jury system is a workable procedure in capital cases. Petitioner contends that he would have no complaint to a jury's deciding the question of life or death if framed by adequate rules. But it is earnestly submitted by respondent that a set of rules could never be drafted which would both protect the rights of the accused and the interest of the State."[1]

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[1] Brief for Respondent, p. 3.

In other words, respondent concedes that the death penalty, jury trials, and fairness to the parties cannot co-exist. Since trial by jury is Constitutionally mandated, *Bloom* v. *Illinois*, 391 U.S. 194 (1968), the question on respondent's own premises is whether the retention of the death penalty is of such importance to society that a system which does not "both protect the rights of the accused and the interest of the State" may Constitutionally be retained. Assuming, without conceding, that fundamental unfairness in a criminal case can ever be excused by such an argument of necessity, we here demonstrate that far from being essential to the welfare of society, the death penalty is in fact detrimental and thus cannot excuse a procedure which is fundamentally unfair. It is, therefore, unnecessary for us to discuss the broader Constitutional question of whether the retention of the death penalty itself violates the Fifth or Eighth Amendments.

We deem of special relevance to this presentation Sigmund Freud's views on capital punishment:

> [P]unishment not infrequently offers, to those who execute it and who represent the community, the opportunity to commit, on their part, the same crime or evil deed under the justification of exacting penance. Only the fact that mankind shrinks from facing facts, from acknowledging the facts of unconscious emotional life, delays the victory of the concept of capital punishment as murder sanctioned by law.[2]

The irrationality of the imposition of capital punishment has special concern for psychiatrists, for the

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[2] Reik, "Freud's View on Capital Punishment", *The Compulsion to Confess* 473 (1959).

recurrent preoccupation with death by all human beings is a fact of special psychiatric importance and thereby places psychiatrists in a unique position to evaluate the death penalty.[3]

It is the position of amicus that imposition of the death penalty is so costly to society, to the administration of a system of criminal justice, and to the sentenced individual as to require that this sanction be abolished. All of the serious studies of deterrence have concluded that there is no evidence that the death penalty has deterrent efficacy.[4] Indeed, as has been pointed out,[5] far from serving as a deterrent, capital punishment may actually serve as an incitement to crime among various types of mentally unstable potential offenders:

(1) The suicidal group, which includes depressed patients who adopt the attitude that death is the only

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[3] See Cohen, "Psychiatrists Look at Capital Punishment", 29 Psychiatric Digest 45 (1968).

[4] "It is generally agreed between the retentionists and abolitionists, whatever their opinions about the value of comparative studies of deterrence, that the data which now exists show no correlation between the existence of capital punishment and lower rates of capital crime." United Nations Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968) 123. See also, Royal Commission on Capital Punishment 1949-1953, Report (H.M.S.O. 1953) 18-24, 58-59, 328-380; President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143; New York State, Temporary Commission on Revision of the Penal Law and Criminal Code, Special Report on Capital Punishment (1965) 2; Pennsylvania Joint Legislative Committee on Capital Punishment, Report (1961) 9, 20-29.

[5] *E.g.*, Hart, "Punishment and Responsibility", 86-88 (1968); Weihofen, "The Urge to Punish" 161 (1956).

just punishment for their imagined sins and commission of capital offenses is a means of securing it.

(2) Those to whom the lure of danger has a strong appeal. The prospect of being caught and being sentenced to death serves as an actual incentive to crimes of violence.

(3) The exhibitionist who is fascinated with the idea of pitting his wits against the police and thereafter being the central figure at a spectacular murder trial.

In his paper "A Psychiatrist Looks at the Death Penalty" presented at the 122nd annual meeting of the American Psychiatric Association on May 11, 1966, Dr. Louis J. West elaborated upon the thesis that the death penalty breeds murder in that it becomes "a promise, a contract, a covenant between the society and certain warped mentalities who are moved to kill" (*Id.* at 3), by a series of case illustrations:

> "Recently an Oklahoma truck driver was stopping for lunch in a Texas roadside cafe. A total stranger—a farmer from nearby—walked in the door and blew him in half with a shotgun. When the police finally disarmed the man and asked why he had done it, he replied, 'I was just tired of living.'
>
> "In 1964 Howard Otis Lowery, a life-term convict in an Oklahoma prison, formally requested a judge to send him to the electric chair after a District Court jury found him sane following a prison escape and a spree of violence. He said that if he could not get the death penalty from that jury he would get it from another, and complained that officials had failed to live up to an agreement to give him death in the electric chair.

when he pleaded guilty to a previous murder charge in 1961.

"Another murderer, James French, asked for the death penalty after he wantonly killed a motorist who gave him a ride while hitchhiking through Oklahoma in 1958. However, he was 'betrayed' by his Court-appointed attorney who pleaded him guilty and got him a life sentence instead of the requested execution. Three years later French strangled his cellmate for no obvious reason: a deliberate, premeditated slaying. He has been convicted three times for that crime, declared legally sane and sentenced to death each time. This sentence he deliberately invites in well-organized, literate epistles to the Courts and in provocative challenges to the jurors. During a psychiatric examination in 1965 French admitted to me that he had seriously attempted suicide several times in the past but 'chickened out' at the last minute, and that a basic motive in his murdering another prisoner was to force the State to deliver the electrocution to which he feels entitled and which he deeply desires."[6]

Thus, while there may be isolated and anecdotal reports of persons who have been dissuaded from committing capital crimes by fear of the death penalty, the worth of such fragile evidence[7] as support for continuation of capital punishment is, in our opinion, clearly overcome by the documented findings of instances where the death penalty encourages capital crime.[8] Moreover, there is substantial evidence that

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[6] West, *supra*, at pp. 3-4.

[7] Generally, such evidence is unsustained by objective evidence. See, *e.g.*, Canada, Joint Committee of the Senate and House of Commons on Capital Punishment, Report (1956), paras. 29-33, 43-52.

[8] See particularly Hart, *supra*, n. 5, at p. 88.

the death penalty creates a breeding ground for psychosis in death row. Very often prisoners deteriorate rapidly following the imposition of the death penalty. In their study of eighteen men and one woman awaiting death in the Sing Sing death house, Drs. Harvey Bluestone and Carl L. McGahee[9] noted in virtually every case studied the presence of degenerative psychological effects, including delusion, persecution, and withdrawal as the human mind attempted, in the environment of death row, to set up defenses against intense anxiety or the paralyzing depression occasioned by thought of the inevitable and impending end. Dr. West examined Jack Ruby, the convicted killer of Lee Harvey Oswald, a number of times and noted that by every objective medical criterion Ruby had become grossly psychotic since he had been sentenced to death.[10] The stress on Jack Ruby in the relatively short period of time between his sentence and death was rather less than that experienced by many condemned individuals who over the course of several years approach scheduled death down to the last month, or week, or minute, only to live through a breathtaking reprieve or perhaps face another countdown.

A good many of these doomed men require psychiatric care prior to execution, but the requirements of legalized death dictate that when the psychiatrist has improved his patient's condition, he must specify him as ready for execution. This phenomenon,

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[9] Bluestone and McGahee, "Reaction to Extreme Stress: Impending Death by Execution," 119 Am.J. of Psychiatry 393 (Nov. 1962).

[10] West, *supra*, at p. 5.

that only a sane man can be lawfully executed, has historic roots in the "unbroken command of English law for centuries preceding the separation of the Colonies" (*Solesbee* v. *Balkcom*, 339 U.S. 9, 20 (1950) (dissenting opinion of Mr. Justice Frankfurter)). At its earliest stages of development, the common law prohibited execution of the insane, "because by intendment of law the execution of the offender is for example, *ut poena ad paucos, metus ad omnes perveniat*, as before is said: but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." (Coke, Third Institutes 6 (1644)). That this phenomenon of the mind breaking down under the stress of an impending execution is a commonplace of the death penalty is reflected by the several cases which have presented to this Court the problem of insanity supervening after sentence of death,[11] and by the fact that virtually every state has provided some mechanism for suspension of execution of the death penalty upon insanity supervening after sentencing.[12]

In addition to the cost of administering capital cases from trial through final appeal and during the long periods of detention that invariably follow im-

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[11] *E.g.*, *Caritativo* v. *California*, 357 U.S. 549 (1958); *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950); *Phyle* v. *Duffy*, 334 U.S. 431 (1948); *Nobles* v. *Georgia*, 168 U.S. 398 (1897).

[12] See Mr. Justice Frankfurter's dissenting opinion and appendix of pertinent state legislation and judicial decisions, *Solesbee* v. *Balkcom*, 339 U.S. at 14 *et seq.*

position,[13] there would appear to be a greater psychic strain upon the participants in a capital case than in a criminal matter involving lesser sanctions. There are a number of examples of capital cases where the persons who comprised the criminal jury publicly reflect upon and attempt to repudiate their prior determination. Thus, in the case at bar, eleven of the twelve jurors have publicly declared that "upon reflection, they thought his [petitioner's] sentence should be reduced to life imprisonment."[14] Indeed, in the present case the enormity of involvement in capital punishment has motivated the complaining witness as well as the prosecuting attorney to disavow an interest in having petitioner executed.[15] We submit, in short, that the harm caused by the necessity of processing a

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[13] See, for example, a recent newspaper account:

"Billie Austin Bryant was sentenced yesterday to imprisonment for life in a maximum security federal penitentiary without possibility of parole for the murder of two FBI agents last January. * * * In deciding against the death penalty, Judge Gesell [of the United States District Court for the District of Columbia] said, he was not moved by any 'religious, philosophical, ethical, scientific or political controversy or criticism' on capital punishment. 'Purely practical matters controlled the court's decision in this case.'

Imposition of the death penalty, the judge said, would keep Bryant 'indefinitely in the death cell of our antiquated jail,' where he cannot be controlled, while appealing the death sentence.

'The Court has concluded that it would not serve the ends of effective justice to allow the defendant the luxury of all the special attention a capital penalty would generate.' * * * "

Washington Post, Nov. 4, 1969, § A, at 3, col. 5-6.

[14] N.Y. Times, Oct. 12, 1969, § 6 (Magazine) at 60.

[15] *Id.*

capital punishment case to its terrible conclusion[16] is so costly as to warrant the conclusion that capital punishment is unnecessary to the progress of our society and should not be permitted in the case at bar.

CONCLUSION

For the foregoing reasons, amicus submits that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[16] See the following declamation of a sentencing judge: "What I am about to say is not easy for me. I have deliberated for hours, days and nights. I have carefully weighed the evidence. Every nerve, every fiber of my body has been taxed. I am just as human as are the people who have given me the power to impose sentence. I am convinced beyond any doubt of your guilt, I have searched the records—I have searched my conscience —to find some reason for mercy—for it is only human to be merciful and it is natural to try to spare lives. I am convinced, however, that I would violate the solemn and sacred trust that the people of this land have placed in my hands were I to show leniency to the defendants Rosenberg." (Transcript of Record, p. 1616, *Rosenberg v. United States*, Nos. 111 and 112, Oct. Term 1952).